

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 16, 2003

TO : Cornele A. Overstreet, Regional Director
Michael J. Karlson, Regional Attorney
Robert A. Reisinger, Assistant to Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Culinary Workers Local 226 536-2514-5000
(Venetian Casino Resort) 378-4284-8000
Case 28-CB-5928

This Section 8(b)(1)(A) case was submitted for advice on whether the Union unlawfully distributed a facsimile of a settlement agreement notice to employees, and if so whether the Union's conduct should be referred to the Department of Justice (DOJ).

We conclude that the Union's facsimile "Notice" was accurate and not unlawfully coercive, and that this case should not be referred to the DOJ.

FACTS

The Union has been organizing the Employer's employees for several years. In Case 28-CA-16000, the Union alleged that the Employer unlawfully denied Union handbillers access to the sidewalk in front of the Employer's casino. The Region found merit to this allegation. On January 7, 2003, the Region approved a bilateral settlement agreement, signed on behalf of the Employer by Employer's counsel. When the Employer subsequently refused to comply with this settlement, the Region issued complaint and set the case for a hearing on April 3.

On March 27 and 28, Union handbillers appeared at employee parking lots to distribute a flyer captioned "Board Notice to Employees" purporting to be an official Board notice posted pursuant to an approved settlement agreement. The "Notice" was printed in blue borders with official looking Board seals and set forth the same language contained in the bilateral settlement approved by the Region in Case 28-CA-16000.¹ The other side of the "Notice"

¹ That language contained the Employer's agreement to no longer summon the police, or threaten to arrest, or file a criminal trespass complaint against individuals peacefully demonstrating on behalf of the Union on the sidewalk in front of its casino.

contained the same language translated into Spanish. A Union "bug" appeared at the bottom right-hand side of the "Notice." The Union's "Notice" was dated January 7, and the Employer owner's name was typed onto the signature line. The Union distributed the "Notice" only on these two days and then ceased.

The Employer received copies of the Notice from various Union handbillers who, according to the Employer, represented themselves to be Board employees. The Region has found, however, that the Union handbillers in fact did not represent themselves as Board agents.

The Employer argues that the Union's facsimile of the bilateral settlement agreement notice violated the following federal criminal statutes, set forth in pertinent part:

18 U.S.C. Section 1017

Whoever fraudulently or wrongfully affixes or impresses the seal of any department or agency of the United States to or upon any certificate, instrument, commission, document, or paper, or with knowledge of its fraudulent character, with wrongful or fraudulent intent, uses, buys, procures, sells, or transfers to another any such certificate, instrument, commission, document, or paper, to which or upon said seal has been so fraudulently affixed or impressed, shall be fined under this title or imprisoned. . .

18 U.S.C. Section 701:

Whoever manufactures, sells, or possesses any badge, identification, card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined under this title or imprisoned . .

On March 31, Union handbillers again stationed themselves at the same employee parking lots and distributed flyers labeled "[Employer] Union Update." The flyers set forth the Union's version of the events in Case 28-CA-16000,

including the Region's approval of the bilateral settlement agreement on January 7, the Employer's subsequent noncompliance with that settlement, and the fact that a Board hearing was set for April 3. Finally, on April 7, Union handbillers again stationed themselves at the same employee parking lots and distributed an internet article describing the events surrounding the settlement agreement, the Employer's subsequent noncompliance, and the hearing date of April 3.

ACTION

We conclude that the Union's facsimile "Notice" was not unlawfully coercive within Section 8(b)(1)(A), and that this case should not be referred to the DOJ.

First we find, in agreement with the Region, that the Union's "Notice" was an accurate reproduction of the parties' bilateral settlement agreement notice. The Union's "Notice" accurately set forth the language agreed to by the Employer, in both Spanish and English. The Union's "Notice" did misstate that the Employer owner, rather than its legal counsel, signed the settlement agreement. The Union's "Notice" also arguably misstated that the settlement agreement notice had been printed in both English and Spanish. We find neither of these misstatements to be a material misrepresentation of the parties' settlement agreement.

Research uncovered no cases finding that a union's accurate reproduction of a bilateral settlement agreement notice violates Section 8(b)(1)(A). However, the Board will set aside an election where a party has reproduced facsimiles of the Board's official ballot and marked those facsimile ballots to urge employees to vote in a particular way. The Board finds such facsimiles objectionable and grounds for setting aside an election because "no participant in a Board election should be permitted to suggest either directly or indirectly to the voters that this Government agency endorses a particular choice."² Even assuming, arguendo, that the Union's facsimile "Notice" might constitute objectionable conduct, we find that it did not violate Section 8(b)(1)(A) because it was not coercive.

The Board will find another type of objectionable conduct, Union offers to waive initiation fees for employees who join prior to a Board election, to also violate Section

² See, e.g., Silco, Inc., 231 NLRB 110 (1977).

8(b)(1)(A).³ In finding that violation, however, the Board explicitly relied on the fact that the union's offers to waive initiation fees amounted to coercive "threats of exacting higher fees later when maintenance of membership may be a condition of employment." *Id.* at 605. The Board thus found mere objectionable conduct to also violate 8(b)(1)(A) based upon an explicit finding of coercion.

Even assuming that the Union's "Notice" here might constitute objectionable conduct, we find that it had no coercive effect. The Union's "Notice" simply and accurately reproduced the Employer's initial agreement in the settlement to no longer unlawfully deny access to its sidewalk. We find that merely reproducing the Employer's promise to comply with the Act, even where the Employer later reneged on that promise, would not reasonably tend to coerce employees in their exercise of Section 7 rights.

The Union's "Notice" also appears to be protected by Section 8(c) of the Act.⁴ Section 8(c) provides in pertinent part that:

[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

The Union's "Notice" merely reproduced the parties' bilateral settlement agreement language, which expressed the view or argument of the Region and the Union that the Employer had violated the Act. Since the "Notice" otherwise contained no threat or promise of benefit, it did not constitute an unfair labor practice. Finally, the Union's "Notice" also constituted a mere noncoercive handbill.⁵

³ Teamsters Local 420 (Gregg Industries), 274 NLRB 603 (1985), citing NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973).

⁴ Section 8(c) applies to unions as well as employers. See NLRB v. IBEW Local 3, 828 F.2d 936 (2d cir. 1987) (court rejects union argument that Section 8(c) protected union threat to strike in contravention of the parties' collective-bargaining agreement).

⁵ See DeBartolo Corp. v. Florida Coast BCTC, 485 U.S. 568 (1988).

In sum, we conclude that the Union's "Notice" was not coercive within 8(b)(1)(A) and that this case should not be referred to the DOJ.

B.J.K.